Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

DAVID ALMANZAR,

Petitioner,

v.

MICHAEL T. MALONEY, COMMISSIONER OF THE DEPARTMENT OF CORRECTIONS, MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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On the Petition:

DAVID A. MILLER

Dated: May 17, 2002

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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QUESTION PRESENTED

I. Should a defendant in a stipulated evidence trial receive all of the Sixth Amendment rights?

LIST OF ALL PARTIES

A list of the parties to the proceeding whose judgment is the subject of this petition is as follows:

David Almanzar, petitioner-appellant, and

Michael T. Maloney, Commissioner of Corrections, Commonwealth of Massachusetts, respondent-appellee.

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OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit upholding the denial of the petitioner's petition for a writ of habeas corpus by the United States District Court for the District of Massachusetts appears at Appendix A to this petition (App. 1a) and is reported as *Almanzar* v. *Maloney*, 281 F.3d 300 (1st Cir. 2002).

JURSIDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the First Circuit sought to be reviewed was entered on February 25, 2002, and appears at Appendix A to this petition. (App. 1a.) This petition is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Supreme Court Rule 10(c) is invoked because the First Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment VI of the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defence".

The Antiterrorism and Effective Death Penalty Act (AEDPA) (West 2002), 28 U.S.C. § 2254(d)(1) provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF FACTS

On April 18, 1996, there was a trial in the Superior Court of Essex County, Massachusetts, with Cowin, J., presiding. The Court provided David Almanzar an interpreter. (App. 25a.) The prosecutor said, "Your Honor, as I understand it, Mr. Almanzar wants to have a jury waived trial with stipulated facts. If he is found guilty after that proceeding, there is an agreed-upon recommendation." (App. 25a.)

The Superior Court Judge asked petitioner David Almanzar questions "to make certain that your waiver of a jury trial is voluntarily, freely, and knowingly given, and that you understand the consequences of waiving a jury." (App. 26a.)

The Judge asked him to tell her his name and age (42); how far he went in school (12th grade); whether he ever had been treated for a mental condition (no); whether he was aware of having any mental illness at the time of the questioning (no);

whether he had taken any medication (no); and whether he was under any influence of drug or alcohol (no). The Judge then continued, questioning him about whether he was aware that he was charged with two drug offenses. (App. 26a-27a.)

The Judge next inquired whether Almanzar was aware that to find him guilty, the Commonwealth must show his possession of heroin and cocaine with the intent to manufacture and distribute them. (App. 27a.)

The Judge then advised Almanzar that the jury consisted of people from the community; that Almanzar could help in choosing them; that the verdict of the jury must be unanimous; and that the jury decides guilt while a judge makes rulings of law during trial, instructs the jury on the law, and imposes sentence in case of guilt. (App. 28a.)

The Judge asked Amanzar whether he knew that, where the jury is waived, the Judge alone decides whether a person is guilty according to the facts and law. (App. 28a.) With respect to legal representation, the Judge asked whether Almanzar was content with his lawyer's work and whether his lawyer advised him. (App. 29a.)

Almanzar assured the Judge that nobody forced his waiver of a jury trial, that he received no promises or threats, that at the time of trial he still wanted to waive his right to a jury trial, and that his waiver was made voluntarily and intelligently. (App. 29a.) Almanzar signed a jury waiver form. (App. 30a.)

Without engaging in any cross-examination or presenting witnesses or evidence, Defense Attorney Buso merely stated that the evidence presented shows that there was 100 grams and not 200 grams of contraband. (App. 30a.) Attorney Buso said to the

Judge that the defendant was willing to stipulate to the facts read into the record by the prosecutor and that there was an agreement as to the sentence, reducing the charge involving 200 grams of heroin to 100 grams of heroin. (App. 30a.)

The state prosecutor read the stipulated facts in which quantities of heroin and cocaine were found and attributed to Almanzar. (App. 3la-35a.) Following the Judge's finding that the defendant was guilty of the trafficking offense, the Judge asked, "Does the defendant understand that he is not agreeing to the truth of anything that was said by the government?" (App. 36a.) The petitioner's attorney responded:

> "Yes, your honor. I have had lengthy discussions with Mr. Almanzar regarding his choices for a jury trial, jury waived, or stipulated facts trial . . . and I believe that he fully understands the different options and has ultimately elected this manner in order to preserve his right of appeal on the prior motions [to suppress]." (App. 36a.)

It is worth noting that counsel for the defendant has, in this exchange, usurped the defendant's personal right to address the Court regarding the constitutional waivers at issue in the prima facie trial.

When the Judge asked Almanzar whether he had any questions to ask her, he told her, "Can I ask my attorney something in private?" (App. 37a.) Almanzar requested a moment to ask his attorney a question. (App. 37a.) Attorney Buso stated that, "Mr. Almanzar questioned counsel about other possible evidence in this case . . ." (App. 37a.) The Judge told Attorney Buso (or – and this cannot be overemphasized in its importance – the defendant

himself) that he did not have to tell the Trial Judge what the defendant or his attorney (once again, the ambiguity cannot be overlooked) said about such evidence.[1] (App. 37a.)

The petitioner had some doubt, concern, or lack of understanding, or else he would not have requested a private conference with his counsel.

In any case, after a brief discussion between the petitioner and his attorney, the Judge asked Almanzar, "Have you had sufficient time to discuss any questions you had with your attorney?" The petitioner indicated that he understood everything. (App. 37a.) The judge found Almanzar guilty of so much of the trafficking in cocaine indictment as charged a net weight of 100 grams or more, but not 200 grams, and possession of heroin with intent to distribute and, based on an agreed upon recommendation, imposed a ten to twelve year sentence and a five to eight year concurrent sentence. (App. 38a.)

In *Commonwealth* v. *Almanzar*, 46 Mass. App. Ct. 1112, 705 N.E. 2d 1178 (1998) (unpublished table decision); the Massachusetts Appeals Court upheld the procedure, but emphasized that "we have repeatedly stated that the procedure employed in this case should be avoided because it invites hairsplitting appeals." (App. 21a). See Slip Opinion at 1, cited with approval in *Almanzar* v. *Maloney*, 281 F.3d 300, 304

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[1] Each reviewing Court came to different and entirely inconsistent conclusions about this crucial matter. The state appellate court found that this leads to "hairsplitting appeals"; the United States District Court loudly omitted the foregoing exchange from its analysis; the United States Court of Appeals dealt directly with it and said that it does not demonstrate misunderstanding or conflict between attorney and client. See *infra* at 11-13 for a detailed discussion of the applicable standards.

n. 5 (1st Cir. 2002). The Supreme Judicial Court of Massachusetts, without comment, denied Almanzar's application for direct appellate review in *Commonwealth* v. *Almanzar*, 707 N.E. 2d 1079 (Mass. 1999) (unpublished table decision). (App. 12a.)

Under 28 U.S.C. § 2241 et seq., Almanzar presented his claim to the United States District Court on a petition for writ of habeas corpus. The District Court reviewed the claim pursuant to 28 U.S.C. § 2254(d) as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, and as interpreted by the Supreme Court in *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000). The United States District Court's review includes an inquiry into whether the state court decision was "contrary to" or an unreasonable application of the Supreme Court precedent of *Brookhart* v. *Janis*, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966). (App. 15a.)

The District Court found the *Brookhart* precedent inapposite – in essence finding that there was no decision of the Supreme Court dispositive of the instant matter. (App. 15a.) The United States Court of Appeals for the First Circuit Court held that the District Court erred in finding *Brookhart* to be inapposite, but that the District Court reached the right result in denying the writ of habeas corpus. (App. 7a.) *Almanzar* v. *Maloney*, 281 F.3d at 304 n. 3.

REASONS FOR GRANTING THE PETITION

A DEFENDANT IN A STIPULATED EVIDENCE TRIAL IS ENTITLED TO ALL SIXTH AMENDMENT RIGHTS.

I. The writ should issue because there was an unreasonable application of Supreme Court precedent concerning the waiver of the right to plead not guilty.

At Almanzar's stipulated evidence trial that was essentially a guilty plea, the Judge did not tell defendant that he had the right to confront his accusers, to compel the attendance of witnesses, and to present evidence in his defense. This deprived Almanzar of his constitutionally required protections under the Sixth Amendment.

There was no informed waiver of petitioner's rights by petitioner. For, when Almanzar did not go along with the procedure, and asked his counsel about his other evidence in his case, "the petitioner himself did not intelligently and knowingly agree to be tried in a proceeding that was the equivalent of a guilty plea . . ." *Brookhart*, 384 U.S. at 7, 86 S. Ct. 1245.

In *New York* v. *Hill*, 528 U.S. 110, 114 (2000), the Supreme Court limned the essential importance of *Brookhart* in the scheme of the Sixth Amendment:

> What suffices for waiver depends on the nature of the right at issue. "Whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United*

> *States* v. *Olano*, 507 U.S. 725, 733 (1993). For certain fundamental rights, the defendant must personally make an informed waiver. See, e.g., *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938) (right to counsel); *Brookhart* v. *Janis*, 384 U.S. 1, 7-8 (1966) (right to plead not guilty).

The First Circuit erred in failing strictly to apply the *Brookhart* precedent. The rule is very clear and applies to all informed waivers of the right to plead not guilty. The defendant must participate personally in the waiver—and that did not occur in the instant case. In addition, the First Circuit avoided the issue whether Almanzar personally made an informed waiver when he asked his counsel what happened to his evidence.

The First Circuit says that the trial judge determined that the defendant understood he was not admitting to the proffered evidence. (App. 8a.) *Almanzar* v. *Maloney*, 281 F.3d 300, 304 (2002). Simply, this is beside the point. Reliance on the trial judge to assert the defendant's rights is misplaced because no one can be both judge and accused. A. Lewis, *Gideon's Trumpet* (NY 1964) at 141. Indeed, *Brookhart* requires the defendant to waive personally his right to plead not guilty, see *New York* v. *Hill*, *id.*; it does not permit the replacement of the defendant's waiver with the acquiescence of the attorney in response to the queries of the trial judge. If there was any doubt in the meaning of the Supreme Court's disposition in *New York* v. *Hill* on this point, it vanishes upon review of the sentence immediately following the quotation set forth above: "For other rights, however, waiver may be effected by action of counsel." 528 U.S. at 114 (emphasis added). Justice Scalia's opinion for a unanimous Court pellucidly contrasts those rights that must personally be waived

with those rights that may be waived "by action of counsel."

The next apparent wrong turn taken by the First Circuit is the conclusion that the petitioner intelligently and knowingly agreed to what occurred. The facts dictate the opposite conclusion: the defendant wanted to know from his lawyer what happened to his evidence, with intentional instructions by the trial judge to the attorney not to reveal the concerns that the defendant had.

The brush stroke that follows in the decision of the First Circuit makes the canvas entirely muddy: the First Circuit posited that, unlike in *Brookhart*, the defendant and his attorney in the present case were not at odds with each other. 281 F.3d at 304. How can this be, when Almanzar, the defendant, asks his defense lawyer, Mr. Buso, what happened to his evidence after the trial evidence was introduced and the Judge entered her findings? In both cases (the present one and *Brookhart*) there was a lack of agreement between the defendants and their counsel over what was being presented to the court.

The District Court and the Court of Appeals applied a narrow and overly-literal interpretation of the holding of the *Brookhart* case to the instant matter. This case is indistinguishable from *Brookhart* because the defendants in both cases suggested opposition to the course of the proceedings and were ignored by their counsel and the trial court. The trial court should have advised the defendant that the stipulation is tantamount to a guilty plea and it should have complied with the procedural protections provided for such a guilty plea. In addition, the questioning of the defendant about what had happened to his evidence suggests clearly that the defendant's decision to stipulate had not been made knowingly and voluntarily.

Contrary to the decision of the lower court, it is respectfully submitted that the Supreme Court has addressed the constitutional and procedural protections required for defendants like Almanzar who choose to plead not guilty, but stipulate that the government could present facts sufficient to convict. The petitioner contends that the state court procedure in the instant case is "contrary to" federal law as determined by the Supreme Court and that it permits an unreasonable application of federal law as determined by the Supreme Court. See *Williams* v. *Taylor*, 529 U.S. 362, 405-406 (2000).

"The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." See *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966). Here, the state court procedure is contrary to federal law and an unreasonable application of federal law.

The *Brookhart* case, like the instant case, involved a defendant who did not plead guilty but who consented to a bench trial. 384 U.S. at 2. In *Brookhart*, the state trial court denied a forgery defendant the right to cross-examine hostile witnesses. On appeal, the government asserted that the defendant had agreed to a prima facie hearing, a trial format that precluded cross-examination, thereby waiving his confrontation rights. The Supreme Court disagreed, ruling that the alleged waiver was constitutionally insufficient. The Supreme Court reversed the conviction. The state offered all of the evidence of guilt; and the defendant did not challenge or contradict the state's evidence with his own evidence. The stipulations in *Brookhart* and the instant matter were not trial tactics but established guilt.

The First Circuit in the instant matter disagreed with the petitioner's position that, like the

defendant in *Brookhart*, he was subjected to a trial that denied him his rights to confront his accusers, to compel the attendance of witnesses, and to present evidence in his defense under the Sixth Amendment. The United States Supreme Court treated the *Brookhart* defendant's truncated trial as a guilty plea. The United States Supreme Court held that the petitioner did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him. *Brookhart*, 384 U.S. at 7.

The Supreme Court relied upon the fact that immediately after the Judge stated that the defendant, in effect, admitted his guilt, he personally interjected his statement that "I would like to point out in no way am I pleading guilty to this charge." *Id.*

Just as nothing can possibly support a contention that counsel can override his client's expressed desire to plead not guilty and enter in the name of his client another plea-whatever the label-nothing can support a contention that counsel can override his client's expressed desire to have his evidence presented in his defense and stipulate to the evidence offered by the Commonwealth of Massachusetts.

Counsel could not shut off the defendant's constitutional right to confront and cross-examine witnesses against him, which he would have an opportunity to do under a plea of not guilty in *Brookhart* and the instant matter. Indeed, the Supreme Court stated "[since] we hold that petitioner neither personally waived his right nor acquiesced in his lawyer's attempted waiver," the judgment was reversed. 384 U.S. at 8. The *Brookhart* case explicates a federal guarantee to confront the witnesses and cross-examine the witnesses in a situation like the

present one in which defendant's counsel agreed to all facts required for a finding of guilt, which amounted to a guilty plea because the Commonwealth offered stipulated evidence of guilt that defendant did not challenge or contradict with his own evidence. This case does not involve strategic and tactical matters such as selective introduction of evidence based on counsel's decision.

There is a presumption against such a waiver of constitutional rights and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), and no such intentional relinquishment by the defendant of his right to present evidence appears in this record. The trial court most certainly should have asked the defendant himself what he meant when he asked through an interpreter what happened to the rest of his evidence. The denial of the defendant's personal right to plead not guilty is constitutional error and no amount of showing of want of prejudice would cure it under the Sixth Amendment to the United States Constitution. *Pointer* v. *Texas*, 380 U.S. 400, 406 (1964).

The record does not establish that the defendant, who questioned his counsel about "other possible evidence in the case" had intelligently and knowingly waived the right to confront and cross-examine witnesses. His attorney alone agreed to a truncated trial, based solely on stipulated evidence presented by the state, which was the practical equivalent of a guilty plea and therefore the procedure was unlawful. See *Brookhart*, 384 U.S. at 5.

As a result, the *Brookhart* holding mandates the issuance of the writ of habeas corpus. This state court procedure is therefore "contrary to" federal law as determined by the Supreme Court. See *Taylor*, 539

U.S. at 405-406. The procedure applies a rule that contradicts the governing law set forth in *Brookhart*. In addition, the state court procedure confronts a set of facts that are materially indistinguishable, and nevertheless arrives at a different result from the *Brookhart* precedent in an unreasonable application of federal law. 28 U.S.C. § 2254(d)(1) (2002 ed., Supp. V).

II. Federal criminal procedure and the procedures adopted in some states clearly preserve Sixth Amendment rights and protect all legitimate requirements of federalism.

The federal procedure and the procedures adopted in some states have achieved a solution to the constitutional problems raised by the instant matter.

Federal Rule of Criminal Procedure 11(a)(2) resolves the issue by providing for a conditional plea: "With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea." The goal to be achieved in the instant matter could have been reached under the federal rule, but without constitutional hazard.

A conditional plea is often employed after the denial of a motion to suppress or some other pretrial issue where counsel believes he or she may be successful on appeal. Since a defendant has very limited rights to interlocutory appeal, this plea often is the only effective way to preserve appellate issues and yet get some benefits for entering a guilty plea. There is nothing to prevent a defendant from attempting to

negotiate a favorable bargain from the prosecutor. This is what happened with Almanzar as the weight of the drugs was reduced in exchange for having a stipulated evidence trial. In the event the defendant is successful on appeal the plea and sentence will proceed according to whatever appellate ruling has been entered.

At the state level, many jurisdictions by statute allow appeal from a motion to suppress notwithstanding a subsequent guilty plea. *See, e.g.*, Cal. Penal Code § 1538(m); N.Y. Crim. Proc. Law § 710.20(l); and Wis. Stat. Ann. 971.31(10). The states are candid in acknowledging that this saves money for the criminal justice system by avoiding essentially phony trials. Advisory Committee Notes on Amendment to Rule 11 (1983). These jurisdictions heed the constitutional considerations explained by the *Brookhart* court, which most recently were reaffirmed by Justice Scalia speaking for the whole court in *New York* v. *Hill*. The procedure adopted in this case by the Commonwealth of Massachusetts contrasts sharply with the New York procedure which the Supreme Court called "a commendable effort to relieve the problem of congested trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution." *Lefkowitz* v. *Newsome*, 420 U.S. 283, 293 (1975). There is no reason for a defendant like Almanzar who has lost his suppression motions to go through an entire trial simply to preserve the pretrial issues for later appellate review. This results in an expensive waste of prosecutorial and judicial resources, and cuts into the speedy trial rights of other defendants. See Advisory Committee Notes on Amendment to Rule 11 (1983), cited with approval by *United States* v. *Vonn*, 122 S. Ct. 1043, 1049 n. 6 (2002).

III. The stipulated evidence trial has not proved satisfactory for judicial administration.

The petitioner's present request of the federal courts in no way trenches upon the rights reserved to the states in the federal system. After all, the Massachusetts Appeals Court has acknowledged that the procedure invites "hairsplitting appeals." The First Circuit agreed.

The procedure here is not feasible under the circumstances. The precise issues here do go to the heart of this Court's adequacy jurisprudence, and it is necessary for this Court to explore its implications, as the dissent argued in *Lee* v. *Kemna*, 122 S. Ct. 877 (2002). The dissent pointed out in *Lee* that the "argument is not that Missouri has no interest in enforcing compliance with the rule in general, but rather that it has no interest in enforcing full compliance in this particular case." *Lee* v. *Kemna*, 122 S.Ct. at 894. By contrast, Massachusetts has little interest in enforcing compliance with this procedure in general, as its appellate court has disavowed it, but the process is costly and impinges on the speedy trial rights of other defendants.

The majority in *Lee* held that because the procedural rule's essential purposes were substantially served by other procedural devices, such as the opening statement, voir dire, and defendants' testimony on the stand, the Missouri court was only concerned with formalities and substantial compliance with one of its rules. The First Circuit looked closely at the record of the Massachusetts trial court, however, and decided that, all in all, despite sharing the concerns of the Massachusetts appellate court that the prima facie trial invites appellate challenges, Almanzar knew enough and stood content enough for knowledgeable waiver. This invites this Court to take this case in order make a realistic

appraisal of the important considerations of the Sixth Amendment, emphasized without qualification in *Brookhart* and *Hill.*

This Court should, therefore, broach the topic of whether the state procedural rules further a legitimate state interest in the actual circumstances of application to the very case before the Court. This may well be a good example of when this Court should vacate the state court judgment, where the legitimate state interest in enforcing this procedure is negligible, but the national interest in uniformity and cost savings, reflected in the Advisory Committee Notes, is great.

IV. The Sixth Amendment minimally requires knowing waiver.

The Supreme Court should craft a Constitutional confrontation waiver test for various purposes. The instant matter and the *Brookhart* precedent involve rulings of fundamental relevance to the line of attorney error waiver cases, see *Taylor* v. *Illinois*, 484 U.S. 400 (1988), cases in which defendants take the stand, see *Rock* v. *Arkansas*, 483 U.S. 44 (1987), and the cases defining the propriety of waivers by counsel such as those of Sixth Amendment speedy trial rights, *Hill, supra.* This case illustrates fundamental error concerning the personal right of a defendant to plead not guilty. The question arises in connection with the Sixth Amendment confrontation clause and out-of-court statements by absent declarants, as formulated in *Taylor*, in which the Court addressed the Constitutionality of the witness preclusion sanction. Note, Leading Cases, 102 Harv.L.Rev. 143 (1988).

The byways, detours, and false starts in the emerging roles of counsel for waiver decision-making are raised with most telling effect by the instant

matter. See Vivian O. Berger, "The Supreme Court and the Defense Counsel: Old Roads, New Paths, a Dead End." 86 Col.L.Rev. 9, 13 - 46 (1986); and Frase, "Comparative Criminal Justice as a Guide to American Law Reform," 78 Cal.L.Rev. 539, 644 n. 544 (1990).

Perhaps most importantly, the empirical data suggest that the confusion reflected in this matter about Constitutional rights waivers is virtually universal among private counsel and public defenders in the arena of the criminal courts. See Uphoff and Wood, "The Allocation of Decision-Making Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decision-Making," 47 U. Kan. L. Rev. 1 (1995).

Also, United States Courts of Appeal – including the First Circuit – have been bothered by these issues. Compare *United States* v. *Lyons*, 898 F.2d 210, 216 (1st Cir. 1990) and *Bonilla-Romero* v. *United States*, 933 F.2d 86 (1st Cir. 1991) with *Adams* v. *R.S. Peterson*, 968 F.2d 835 (9th Cir. 1992)(en banc) and *United States* v. *Stalder*, 696 F.2d 59 (8th Cir. 1982); and Comment, "Confessional Stipulations: Protecting Waiver of Constitutional Rights", 61 U. Chi. L. Rev. 225 (1994). See also *Hoover* v. *Beto*, 439 F.2d 913, 923 (5th Cir. 1971) and *Walker* v. *Lockhardt*, 620 F.2d 683, 687 (8th Cir. 1980).

This chaos, indeed, invites hair-splitting appeals. The Massachusetts procedure invites correction of the issue of the role of counsel in the right to plead not guilty. A fundamental confrontation right was not honored in the present case. This works to the disadvantage of the defendant and the government, over and above the fate of Mr. Almanzar, and its correction will lead to certainty in the definition of the waiver of the right to plead not guilty.

CONCLUSION

For all of the reasons set forth above, petitioner David Almanzar requests the Supreme Court to issue a writ of certiorari to the First Circuit Court of Appeals, and for such other and further relief as to the Court seems just.

Respectfully submitted,

By Petitioner's Attorney,

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On the Petition:

DAVID A. MILLER

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APPENDIX A

DAVID ALMANZAR,
Appellant,

v.

MICHAEL T. MALONEY, Commissioner
of Department of Corrections,
Respondent, Appellee.

No. 01-1856

United States Court of Appeals,
First Circuit.

Heard Feb. 6, 2002.
Decided Feb. 25, 2002.

After his state court drug conviction was affirmed on direct appeal, petitioner sought federal habeas corpus relief. The United States District Court of the District of Massachusetts, Reginald C. Lindsay, J., denied petition. Petitioner appealed. The Court of Appeals, Stahl, Senior Circuit Judge, held that state court determination that bench trial held with stipulated facts was not in essence a guilty plea, so that alleged failure to adequately petitioner of his constitutional rights did not render resulting conviction invalid, was not contrary to clearly established federal law.

Affirmed.

Robert O. Berger for appellant.

William J. Meade, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, was on brief, for appellee.

Before SELYA, Circuit Judge, STAHL, Senior Circuit Judge, and LIPEZ, Circuit Judge.

STAHL, Senior Circuit Judge.

Appellant David Almanzar ("Petitioner") appeals from the denial of his petition for a writ of habeas corpus. Specifically, Almanzar argues that he is entitled to a new trial because his jury-waived trial was, in effect, a guilty plea, and as such, the judge's colloquy failed to satisfy minimum constitutional requirements. We affirm.

I.

In March 1995, Almanzar was indicted for trafficking in 200 or more grams of cocaine and for possession of heroin with the intent to distribute. He challenged the constitutionality of the search yielding the narcotics, but his pretrial motions to suppress were denied in October 1995, with the court's written findings of fact and conclusions of law filed two months later. Petitioner then sought to have the indictment dismissed on the basis of double jeopardy, but the court rejected this argument as well. After these adverse rulings, in April 1996 Petitioner waived his right to a jury and opted instead for a bench trial before a Superior Court judge.

Because Petitioner challenges the constitutional sufficiency of the April proceeding, we shall describe it in detail. At the outset, the prosecutor explained to the court that Petitioner desired a jury-waived trial with stipulated facts, and

that if he were found guilty after that proceeding, then the parties would present the court with their agreed-upon recommendation for sentencing. The court then conducted a waiver of jury trial colloquy with Petitioner through an interpreter. Specifically, the judge asked Petitioner about his age, his level of education, and his mental fitness. She inquired as to whether he was under the influence of drugs or alcohol, and whether he knew the date and time. She asked Petitioner if he understood the nature of the charges against him, explained the elements of each count, and informed Petitioner that the government would need to prove these elements beyond a reasonable doubt. She informed Petitioner that he was entitled to a jury of his peers and that their verdict would have to be unanimous. The judge explained that jurors make fact determinations and the judge makes rulings of law; however, if Petitioner waived a jury trial, she would perform both functions. After determining that Petitioner had discussed these matters with his attorney and was satisfied with his counsel's advice, the judge asked Petitioner whether he had discussed the possible range of penalties with his attorney. She inquired as to whether anyone was forcing him to waive a jury trial or whether any promises or threats had been made against him. Upon completing her examination, the judge found that Petitioner was waiving his right to a jury trial voluntarily, intelligently and with knowledge of the consequences. She further stated that Petitioner was aware of the differences between a jury and a bench trial, had not been coerced or improperly influenced in his decision and was presently capable of rational judgment. Accordingly, she accepted his waiver of a jury trial.

After this exchange, Petitioner's counsel told the court that his client was willing to stipulate to the facts that the prosecutor would read into the record, and that the parties had agreed, for purposes of

sentencing, to reduce the charge from an amount of cocaine in excess of 200 grams to an amount in excess of 100 grams but not greater than 200 grams. At this point, the judge said, "This is not a guilty plea. It should be absolutely clear to this defendant that he is not pleading guilty. Does the defendant understand that he is not being asked to plead guilty?" Almanzar responded, "Yes, of course."

The prosecutor then read the state's evidence into the record. Petitioner agreed that this would be the evidence that the Commonwealth would present, and his counsel concurred. The judge then found that there was sufficient evidence to warrant guilty findings on both counts of the indictment, and adjudged Petitioner guilty of the two charges. She accepted the parties' agreement regarding the amount of cocaine, and then asked counsel again whether his client understood that he was not agreeing to the truth of anything that had been said by the government. Counsel reassured the court that he was satisfied that his client understood his different options and had chosen a stipulated facts trial in order to preserve his right of appeal on certain prior motions. At this point, the judge asked Petitioner whether he understood everything that had gone on during these proceedings, and Petitioner said that he did. When the judge asked Petitioner if there was anything that he wanted to ask her, he inquired as to whether he could ask his attorney something in private. The judge granted this request. After conferring with his client, Petitioner's attorney informed the court that Almanzar had "questioned counsel regarding other possible evidence in the case and I have explained to him," at which point the judge cut him off, saying, "Okay. You don't have to tell us what you said at all." Then, turning to Petitioner, the judge asked Petitioner whether he had sufficient time to discuss any questions he had with his attorney, to which he responded, "Yes, Madam." The court asked

Petitioner again whether there was anything that he did not understand about what had happened during that morning's proceedings. To this, Petitioner said, "No, everything is all right." Satisfied with his responses and having already found Petitioner guilty, the court proceeded to sentencing.

Petitioner timely appealed, challenging both the constitutional sufficiency of the proceedings before the trial court and the denial of his motions to suppress.[1] On December 15, 1998, the Massachusetts Appeals Court summarily affirmed Petitioner's convictions in an unpublished opinion. Commonwealth v. Almanzar, 705 N.E.2d 1178 (Mass. App. Ct. 1998) (unpublished table decision). The Massachusetts Supreme Judicial Court denied Petitioner's application for leave to obtain further appellate review. Commonwealth v. Almanzar, 707 N.E.2d 1079 (Mass. 1999) (unpublished table decision).

On November 22, 1999, Petitioner filed a petition for writ of habeas corpus, arguing that the trial judge failed to ensure that he had voluntarily and intelligently waived his right to a trial by jury because she did not inform him that he had the right to confront his accusers, to compel the attendance of witnesses, and to present evidence in his defense. The district court denied the writ on May 29, 2001.

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[1] In addition to motions to suppress regarding the physical evidence (i.e., the drugs), Petitioner also had filed a motion to exclude certain statements that he had made to the police. According to the record, Petitioner did not challenge this adverse ruling on appeal.

II.

The standard of review in a habeas case such as this is well-established. As we have previously explained,

> [t]he Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) places new restrictions on a district court's power to grant writs of habeas corpus to state prisoners. Under 28 U.S.C. § 2254(d)(1), a district court may issue the writ only where a state court's adjudication on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 413, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000).
>
> Under the "unreasonable application" clause, a writ may issue "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. We review a federal district court's legal conclusions in a habeas proceeding de novo. Simpson v.

Matesanz, 175 F.3d 200, 205 (1st Cir. 1999).

Johnson v. Norton, 249 F.3d 20, 25-26 (1st Cir. 2001).[2]

[1, 2] Petitioner relies on Brookhart v. Janis, 384 U.S. 1 (1966), in support of his argument that the trial court did not adequately advise him of his constitutional rights before accepting what was essentially a guilty plea.[3] The question in Brookhart, as framed by the Supreme Court, is "whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-

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[2] It is undisputed that the provisions of AEDPA control in Petitioner's case. Furthermore, we note that this petition implicates only 28 U.S.C. § 2254(d)(1), as the constitutional sufficiency of the state court proceedings is a pure legal question. Therefore, we need not address 28 U.S.C. § 2254(d)(2), which allows for habeas relief when the lower court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

[3] In the hopes of buttressing his argument, Petitioner also cites cases from this court, most notably Bonilla-Romero v. United States, 933 F.2d 86 (1st Cir. 1991), and United States v. Lyons, 898 F.2d 210, 216 (1st Cir. 1990). The Supreme Court has made clear, however, that AEDPA precludes federal courts from disturbing state court judgments by relying on precedents created by federal courts of appeals. See Williams v. Taylor, 529 U.S. 362, 381 (2000) ("AEDPA has added, immediately following the 'clearly established law' requirement, a clause limiting the area of relevant law to that 'determined by the Supreme Court of the United States.' If this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar.") (internal citations omitted). The district court found Brookhart to be wholly inapposite, see Almanzar v. Maloney, No. 99-12444-RCL, slip op. at n.4 (D. Mass. May 29, 2001), but reviewed cases from this and other circuits in an effort to give full consideration to Petitioner's claim, see id. at 6-9. Because the district court reached the proper conclusion notwithstanding, its failure to rely solely on Supreme Court precedent is inconsequential.

examine the witnesses against him." Id. at 7. Brookhart, like this case, involved a stipulated facts trial, also known as a "prima facie case." Petitioner maintains that once the trial court learned that Petitioner was asking his counsel about "any other evidence" in the case, it should have ascertained that Petitioner was not, in fact, consenting to a stipulated evidence trial. Therefore, Petitioner argues, this case is indistinguishable from Brookhart, and he is entitled to habeas relief.

[3] The Massachusetts Appeals Court, however, determined that the record did not bear the weight of Petitioner's argument, citing the "specific inquiry by the trial judge of the defendant ascertaining that he understood he was not admitting to the truth of the proffered evidence by the Commonwealth and understood what he was doing." Commonwealth v. Almanzar, No. 97-P-815, slip op. at 1-2 (Mass. App. Ct. Dec. 18, 1998) (hereinafter "Slip Opinion").[4] In Brookhart, on the other hand, the Court found that "the record show[ed] . . . that [the] petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea . . . ." Brookhart, 384 U.S. at 7. Furthermore, unlike Brookhart, where the defendant and his attorney were clearly at odds with each other, in this case Petitioner and his counsel were at all time in agreement about going forward with a stipulated facts trial.

We share the concerns of the Massachusetts Appeals Court about stipulated evidence trials;[5] nonetheless, we find that the state court's ruling was not an unreasonable application of Brookhart. The

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[4] Pursuant to Mass. R. App. Practice 1:28, the Massachusetts Appeals Court filed a Memorandum and Order providing a brief statement of the reasons for its summary denial of Almanzar's appeal.

[5] See Slip Opinion at 1 ("we have repeatedly stated that the procedure employed in this case should be avoided because it invites hairsplitting appeals") (citing Commonwealth v. Abrams, 44 Mass. App. Ct. 584, 589 (1998)).

trial court made painstaking efforts to ensure that Petitioner was aware of the nature and consequences of his decision to proceed with a stipulated evidence trial, and of the rights that he would be forfeiting by doing so. The trial court reiterated on numerous occasions, and Petitioner insisted that he understood that he was not pleading guilty. After Petitioner spoke to his attorney in private, the court once again asked whether he was comfortable continuing with the proceedings. Counsel attempts to read ambiguity and ambivalence into the record where none exists. The fact remains that when the trial court asked Petitioner if there was anything about the proceedings that he did not understand, he said "No, everything is all right." Therefore, on this record, we find no basis for concluding that the state court's determination was an unreasonable application of the Supreme Court's decision in Brookhart.

III.

Finding no error with the district court's denial of the writ of habeas corpus, we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID ALMANZAR	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	99-12444-RCL
MICHAEL T. MALONEY	)	
	)	
Respondent.	)	
	)	

MEMORANDUM AND ORDER
ON PETITION FOR WRIT OF HABEAS CORPUS

LINDSAY, District Judge.

Background

On March 29, 1995, the petitioner, David Almanzar, was indicted by a Massachusetts grand jury for trafficking in 200 or more grams of cocaine,[1] and with possession of heroin with the intent to distribute.[2] On October 2, 1995, the petitioner's pretrial motions to suppress were denied after a hearing. On April 18, 1996, the defendant was found guilty in a bench trial of trafficking in 100 grams or more, but not more than 200 grams of cocaine and of possession of heroine with intent to distribute.

The prosecutor opened the trial by stating: "Your honor, as I understand it, Mr. Almanzar wants

[1] M.G.L.c. 94C, § 32E(b)(4).
[2] M.G.L.c. 94C, § 32(a).

to have a jury waived trial with stipulated facts. If he is found guilty after that proceedings, there is an agreed-upon recommendation." Thereafter, the court conducted a waiver of jury trial colloquy with the petitioner through an interpreter. Afterwards, the court found that the petitioner voluntarily and intelligently waived his right to a trial by a jury. The court then stated: "This is not a guilty plea. It should be absolutely clear to this defendant that he is not pleading guilty. Does the defendant understand that he is not being asked to plead guilty?" To which the defendant responded, "Yes, of course."

Following the finding of waiver, the prosecutor presented the Commonwealth's case in the form of stipulated facts. The petitioner's counsel agreed that the facts recited would be the evidence that the prosecution would present. After hearing the stipulated facts, the court found the petitioner guilty of so much of the indictment as charged a net weight of 100 grams or more, but not more than 200 grams of cocaine, and he was found guilty of possession of heroin with the intent to distribute. Following the court's findings the court asked, "does the defendant understand that he is not agreeing to the truth of anything that was said by the government?" The petitioner's attorney responded:

> Yes, your honor. I have had lengthy discussions with Mr. Almanzar regarding his choices for a jury trial, jury waived, or stipulated facts trial . . . and I believe that he fully understands the different options and has ultimately elected this manner in order to preserve his right of appeal on the prior motions [to suppress].

The court asked the petitioner if he understood "everything that has gone on here today?" The

petitioner then requested a moment to ask his attorney a question. After a brief discussion between the petitioner and his attorney, the court asked the petitioner, "have you had sufficient time to discuss any questions you had with your attorney?" The petitioner indicated that he understood everything. The petitioner was then sentenced. The petitioner filed a timely notice of appeal.

On December 15, 1998, the Massachusetts Appeals Court summarily affirmed the petitioner's convictions in an unpublished opinion. *See Commonwealth v. Almanzar,* 46 Mass. App. Ct. 1102 (1998). On January 26, 1999, the Massachusetts Supreme Judicial Court denied the petitioner's application for leave to obtain further appellate review. *See Commonwealth v. Almanzar,* 428 Mass. 11 12 (1999). On November 22, 1999, the petitioner filed a petition for writ of habeas corpus in this court pursuant to 28 U.S.C. § 2254. In support of his petition, the petitioner argues that the trial judge failed properly to ensure that the petitioner voluntarily and intelligently waived his right to a trial by jury when she did not inform the petitioner that he had the right to confront his accusers, to compel the attendance of witnesses, and to present evidence in his defense.

Discussion

The constraints placed upon the power of the federal court to grant a state prisoner's application for writ of habeas corpus by the Antiterrorism and Effective Death Penalty Act (AEDPA) are well-known. *See Williams v. Taylor,* 529 U.S. 362,412 (2000). The AEDPA provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall

> not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1). The Supreme Court has concluded that the above statutory provision creates two categories of analysis: first, state court decisions that are "contrary to" federal law as determined by the Supreme Court, and second, state court decisions that are an "unreasonable application" of federal law as determined by the Supreme Court. *See Taylor,* 529 U.S. at 405-406; *see also, Mountjoy v. Warden, New Hampshire State Prison,* 245 F.3d 31, 35 (1st Cir. 2001). The Supreme Court has recently explained the difference between the two categories.

A state court decision is "contrary to" federal law as determined by the Supreme Court if it "applies a rule that contradicts the governing law set forth in our cases" or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court) and nevertheless arrives at a result different from [the] precedent." *See Taylor,* 529 U.S. at 405-406. By contrast, a state court decision is an "unreasonable application" of federal law as determined by the Supreme Court "if the state court identifies the correct governing legal rule from [the Supreme Court's) cases but unreasonably applies it to the facts of the particular state prisoner's case," or "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 408. "In defining an unreasonable application of federal law, the Court said that 'the most important

point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law."' *Mountjoy,* 245 F.3d at 35 (citing, *Taylor,* 529 U.S. at 410) (emphasis in original).

The petitioner now argues, as he argued before the state Appeals Court, that the trial judge failed to undertake a minimal, adequate colloquy with the petitioner when she did not inform him that he had the right to confront his accusers, to compel the attendance of witnesses, and to present evidence in his defense. Of course, it is not the law that a defendant who decides to waive his constitutional right to a trial by a jury simultaneously forfeits the right to confront his accusers, compel witnesses, or present evidence. Trials held before judges, like jury trials, afford defendants those fundamental rights. Indeed, the petitioner does not claim, nor could he, that all jury trial waivers must ensure that the defendant knowingly and intelligently forfeits his fights to confront his accusers, compel witnesses, and present evidence. Instead, the view adopted by the petitioner is that the proceeding against him was not a jury-waived trial at all, but rather, a de facto guilty plea, taken without the benefit of the procedural safeguards that must accompany such a plea.[3]

In *Boykin v. Alabama,* 395 U.S. 238 (1969), the Supreme Court established the constitutional and procedural protections required for formal guilty pleas. A defendant must affirmatively demonstrate that his guilty plea is both knowing and voluntary. *Id.*

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[3] The Massachusetts Appeals Court rejected the petitioner's view because the trial court conducted a specific inquiry of the defendant ascertaining that he understood that he was not admitting to the truth of the proffered evidence by the Commonwealth. Moreover, the defendant's counsel asserted at the proceeding that the defendant was aware of his options and that the procedure employed in this case was chosen to preserve the defendant's right of appeal from the denial of his motion to suppress.

at 242. Also, the defendant must understand that a guilty plea operates as a waiver of his constitutional rights, *id.* at 242, including the right against compulsory self-incrimination, the right to a jury trial, and the right to confront witnesses. *Id.* at 244. *See also Parke v. Raley,* 506 U.S. 20, 28-29 (1992); *McCarthy v. United States,* 394 U.S. 459, 466 (1969). By contrast the Supreme Court has never expressly addressed the constitutional and procedural protections required for defendants who choose to plead not guilty, but nevertheless stipulate that the government could present facts sufficient to convict.[4]

"If no Supreme Court precedent is dispositive of a petitioner's claim, then, a fortiori, there is no specific rule to which the state court's decision can be 'contrary.' In such circumstances, a federal habeas court then determines whether the state court decision reflects an unreasonable application of clearly established Supreme Court jurisprudence.

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[4] The petitioner cites *Brookhart v. Janis,* 384 U.S. 1 (1966) in support of his petition. In *Brookhart,* the petitioner argued that he was subjected to a trial that denied him his federally guaranteed constitutional right to confront the witnesses against him and cross-examine the witnesses. The Ohio Supreme Court held that the defendant "did not plead guilty" but "agreed that all the state had to prove was a prima facie case, that he would not contest it and that there would be no cross-examination of witnesses." The United States Supreme Court treated the petitioner's truncated trial as a guilty plea. The Court noted that the "petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him." *Id.* at 7. The Court relied upon the fact that immediately after the judge accurately stated that in a prima facie case the defendant "in effect admits his guilt," Brookhart personally interjected his statement that "I would Like to point out in no way am I pleading guilty to this charge." Id. *Thus, Brookhart* stands for the narrow proposition that defendant's constitutional rights to plead not guilty and to have a trial where he could confront and cross-examine adversary witnesses could not be waived by his counsel without defendant's consent. *Id.* at 7. This case is distinguishable from *Brookhart* since the petitioner never expressed nor implicitly suggested his opposition to his attorney's statements.

This reduces to a question of whether the state court's derivation of a case-specific rule from the Court's generally relevant jurisprudence appears objectively reasonable." *O'Brien v. Dubois,* 145 F.3d 16, 25 (1st Cir. 1998). For the writ to issue, however, "the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that is outside the universe of plausible, credible outcomes." *Id.*

"To the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue." *Id.* Several circuits have confronted the hairsplitting distinction between formal guilty pleas and stipulated bench trials. *See e.g., Adams v. R.S. Peterson,* 968 F.2d 835 (9th Cir. 1992) (en banc); *Bonilla-Romero v. United States,* 933 F.2d 86 (1st Cir. 1991); *United States v. Stalder,* 696 F.2d 59 (8th Cir. 1982). To varying degrees, these courts have steadfastly opposed granting the protections associated with formal guilty pleas to defendants who stipulate that the representations made by the prosecution were supported by the evidence that the state possessed and would present at trial. The Ninth Circuit stated the matter plainly: "A stipulation to facts from which a judge or jury may *infer* guilt is simply not the same as a stipulation to guilt, or a guilty plea." *Adams,* 968 F.2d at 839 (emphasis in original). In determining that the stipulation in *Adams* did not constitute a de facto guilty plea, the Ninth Circuit considered the purposes of the defendant and his counsel in choosing the method of presenting the evidence to the trier of fact. The Ninth Circuit recognized that there "may be a variety of strategic reasons for proceeding by a stipulated facts trial ranging from preservation of issues for appeal to attempting to mitigate the sentence by a partial acceptance of responsibility or

controlling the evidence presented to the sentencing judge." *Id.* at 842 (citing, *United States v. Lyons,* 898 F.2d 210, 214 n.5 (1st Cir. 1990)). Thus, the court concluded that a stipulated facts trial is not equivalent to a guilty plea for *Boykin* purposes, even if it might appear to a reviewing court that the stipulation serves little purpose.

The Eighth Circuit has also refused to equate stipulated bench trials with guilty pleas. *See Stalder,* 696 F.2d 59. It has noted two important differences between stipulated bench trials and formal guilty pleas. First, in a stipulated trial, the judge still has an opportunity to decide the case on the merits. *See United States v. Wray,* 608 F.2d 772, 724 (8th Cir. 1979). Second, the defendant still has an opportunity to raise a defense, either through the stipulation itself or through the preservation of appellate rights. *See Stalder,* 696 F.2d at 62.

The First Circuit has granted slightly more protection to defendants who chose to stipulate during bench trials instead of plead guilty. The court has stated that the trial court should "conduct[ ] a colloquy with the defendant sufficient to demonstrate that the defendant has executed the stipulation freely with the knowledge of the consequences of what he is doing." see *United States v. Lyons,* 898 F.2d 210, 216 (1st Cir. 1990). The First Circuit further distinguishes between stipulations that accept the truth of the evidence presented and stipulations in which the defendant accepts the proposed evidence but leave determinations of veracity to the court. *See Bonilla-Romero,* 933 F.2d at 88. In the case of the former, the court must necessarily dispense a guilty verdict and, "[s]uch a stipulation is tantamount to a guilty plea and therefore requires significant compliance with the safeguards embodied in Rule 11." *Id.* By contrast stipulations in which the defendant does not admit the truth of the evidence are "merely stipulated

testimony and thus allow for much greater flexibility by the trial court." *Id.* (emphasis in original). In those cases, the trial court may determine that the stipulation was entered into knowingly and voluntarily without an extended direct colloquy. *See Bonilla-Romero,* 933 F.2d at 89. "The court may rely on other extrinsic factors to determine whether the defendant's decision to stipulate has been made knowingly and voluntarily." *Id.* In *Bonilla-Romero,* the First Circuit found persuasive the fact that defense counsel clearly stated to the court, in the presence of the defendant and without objection by the defendant, that the decision to stipulate was part of the defendant's trial strategy. Moreover, the defendant was personally questioned regarding his decision to waive his right to a jury trial. His responses indicated that her-as well-informed and was making the decision freely. Based on these facts, the First Circuit determined that his stipulation was agreed to knowingly and voluntarily.

Based on these cases, this court cannot find that the state court decision was "offensive to existing precedent," or "devoid of record support," or "arbitrary, as to indicate that is outside the universe of plausible, credible outcomes." *O'Brien,* 145 F.3d at 25. Instead, the state court acted in conformity with existing federal law as established by the lower federal courts. Here, the trial court took great pains to make sure that the petitioner understood that he was not pleading guilty and that he had an opportunity to "hear the evidence that would be presented at a trial." In addition, defense counsel represented to the court that the petitioner understood that he was not agreeing to the truth of anything that was said by the government and that the petitioner chose the stipulated trial as a strategy "in order to preserve his right of appeal on the prior motions." Based on these facts, the trial court could have reasonably concluded

that the petitioner's decision to stipulate was knowing and voluntary.

This court could find no case, nor has petitioner cited any, that required a trial court in a case with facts like those presented here, to grant a defendant all the procedural protections associated with a formal guilty plea, particularly when the defendant does not stipulate to the truth of the governments evidence. Thus, the failure of the state court to inform the petitioner that he had the right to confront his accusers, to compel the attendance of witnesses, and to present evidence in his defense was neither "contrary to" federal law as determined by the Supreme Court, nor an "unreasonable application" of federal law as determined by the Supreme Court.

Conclusion

The petitioner's petition for writ of habeas corpus is DENIED. The clerk shall enter an order of dismissal. The issues raised by this petition, however, are deserving of further review. Accordingly, the court will issue a certificate of appealability.

So Ordered.

/s/
United States District Judge

Dated: 5/29/01

APPENDIX C

Commonwealth of Massachusetts
Appeals Court for the Commonwealth
At Boston,

In the case no. 97-P-815

COMMONWEALTH
vs.

DAVID ALMANZAR.

Pending in the Superior

Court for the County of Essex

Ordered, that the following entry be made in the docket:

Judgments affirmed.

By the Court,

/s/ , Clerk
Date December 15, 1998

NOTE:
The original of the within rescript
Will issue in due course, pursuant
To M.R.A.P. 23

APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

97-P-815

COMMONWEALTH

vs.

DAVID ALMANZAR.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On appeal from his convictions of trafficking in cocaine with a net weight of 100 grams or more but less than 200 grams and of possession of heroin with intent to distribute, the defendant claims he is entitled to a new trial because his jury waived trial was in effect a guilty plea and the judge's colloquy failed to meet the constitutional requirements for taking a guilty plea. He also claims error in the denial of his motions to suppress.

Although we have repeatedly stated that the procedure employed in this case should be avoided because it invites hairsplitting appeals, Commonwealth v. Abrams, 44 Mass. App. Ct. 584, 589 (1998), we are presented here with another such appeal in which the defendant contends that his jury-waived trial was a de facto guilty plea. We reject his argument, because of the specific inquiry by the trial judge of the defendant ascertaining that he understood he was not admitting to the truth of the proffered evidence by the Commonwealth and understood what he was doing. Furthermore, the record details defense counsel's assertions that the

defendant was aware of his options and that the procedure employed in this case was chosen to preserve his right of appeal from the denial of his motions to suppress. See Commonwealth v. Stevens, 379 Mass. 772, 775-776 (1980); Commonwealth v. Garcia, 23 Mass. App. Ct. 259, 266-267 (1986); Commonwealth v. Babcock, 25 Mass. App. Ct. 688, 691 (1988). Contrast Commonwealth v. Feaster, 25 Mass. App. Ct. 909 (1987), in which no similar inquiry or representations were made.

The defendant also claims that the motion judge's conclusion that the defendant did not voluntarily consent to the search of the Cypress Street apartment was constitutional error. We disagree. We have reviewed the transcript of the motion to suppress hearing and conclude that his findings are not clearly erroneous, nor is his ultimate conclusion incorrect. Commonwealth v. Corriveau, 396 Mass. 319, 326 (1985). Although the defendant was under arrest and in handcuffs at the time that he gave permission to search the other apartments, this, standing alone, would not vitiate the consent. Commonwealth v. Franco, 419 Mass. 635, 642 (1995). We also note that, contrary to the portrait painted by the defendant in his brief, the evidence indicates that at the time of the consent the dog was out of the house, the weapons had been put away, and the interrogation was being conducted by only one officer, while other officers were performing other duties. We cannot say that in these circumstances the judge's conclusion that the defendant knowingly and voluntarily consented to the search of the other apartments as a matter of strategy was clearly erroneous. Cf. Commonwealth v. Cantalupo, 380 Mass. 173, 177-178 (1980) (fact that police did not explain right to refuse to consent to search a factor to be considered but not conclusive in assessing voluntariness).

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Judgments affirmed.

By the Court (Porada, Lenk & Spina, JJ.),

Clerk

Entered: December 15, 1998

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
ESSEX SS.

COMMONWEALTH OF MASSACHUSETTS,	:	SUPERIOR COURT
	:	NO. 9577-CR-921
Plaintiff	:	9577-CR-922
v.	:	
DAVID ALMANZAR, a/k/a EVARISTO ANDURNO, Defendant	:	

JURY WAIVED TRIAL
Salem Superior Court
34 Federal Street
Salem, Massachusetts

Thursday, April 18, 1996

BEFORE: COWIN, J.

APPEARANCES:

COMMONWEALTH OF MASSACHUSETTS, OFFICE OF THE DISTRICT ATTORNEY (By Frederick B. MCAlary, Esq., Assistant District Attorney) Museum Place, One East India Square, Salem, MA, 01970, on behalf of the Commonwealth.

RAYMOND BUSO, ESQ., Suite 300, 120 Washington Street, Salem, MA, 10970, on behalf of the Defendant.

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[3]

Thursday, April 18, 1996
JURY WAIVED TRIAL

MR. MC ALARY: Your Honor, as I understand it, Mr. Almanzar wants to have a jury waived trial with stipulated facts. If he is found guilty after that proceeding, there is an agreed-upon recommendation.

THE COURT: The defendant may be brought forward and sworn. The record will reflect that the interpreter is present and is assisting the defendant. Whereupon,

DAVID ALMANZAR

Was called as a witness, and having been first duly sworn, was examined and testified as follows:

EXAMINATION BY THE COURT

THE COURT: Mr. Almanzar, my name is Judith Cowin. I am an Associate Justice of the Superior Court. Before I can accept your waiver of a trial by jury I need to ask you some questions. I do that to make certain that your waiver of a jury trial is voluntarily, freely and knowingly given, and that you understand the consequences of waiving a jury.

Please tell me if at any time you do not **[4]** understand my questions.

THE WITNESS: No, I understood everything so far.

THE COURT: If anything comes up that you do not understand, please say so.

THE WITNESS: Yes.

BY THE COURT:

Q Please state your name and your age?

A David Almanzar, and I am 42 years old right now.

Q How far did you go in school?

A Till the 12th grade.

Q Have you ever been treated for a mental condition?

A No.

Q Are you aware of any mental illness that you may have now?

A No, Madam.

Q Have you taken any medication today?

A No.

Q Are you under the influence of any drug or alcohol now?

A No, thank the Lord.

Q What day is it today?

A Today is April 18, 1996.

Q What day of the week is it?

A Thursday. **[5]**

Q What time is it now, please?

A If the time is correct on that clock it would be eleven and sixteen minutes.

Q In the morning or the evening?

A In the morning.

Q You understand, Mr. Almanzar, that you have a constitutional right to a -- excuse me. I withdraw that question. Are you aware that you are charged with two drug offenses? One is possession of heroin, Class A, with intent to distribute it, and the second is trafficking in cocaine, Class A, with cocaine or a mixture thereof that had the net weight of over 200 grams.

A Yes, Madam.

Q You know for the Commonwealth to prove you guilty beyond a reasonable doubt on the first offense, the Commonwealth must show that you were in possession of heroin with the intent to manufacture or distribute it, and that heroin is a Class A substance?

A Yes, I understand.

Q And for the second offense the Commonwealth must prove beyond a reasonable doubt the same elements, but that the cocaine you possessed was over 200 grams? **[6]**

A Yes.

Q Do you understand that a jury is made up of people from the community and that you may help in choosing them?

A Yes, Madam.

Q Do you understand that the verdict of a jury must be unanimous?

A Yes, Madam.

Q Do you understand that at a jury trial a jury decides whether you are guilty or not, while the Judge makes rulings of law during the trial, instructs the jury on the law, and imposes sentence in case of guilt?

A Yes, Madam.

Q Do you understand that where a jury is waived, as you are seeking to do now, the Judge alone decides whether a person is guilty in accordance with the facts and the law?

A Yes, Madam.

Q Have you discussed this matter with your lawyer?

A Yes, Madam.

Q Are you content with the work that Mr. Buso has done for you?

A He is excellent.

Q Has Mr. Buso discussed the range of penalties [7] available to you?

A Yes, Madam.

Q Has anyone forced you to waive a jury?

A No, Madam.

Q Have any promises or threats been made which have caused you to waive a jury?

A No, Madam.

Q Do you still want to waive a jury?

A Yes.

Q As I understand it you are waiving a jury voluntarily and intelligently. Am I correct?

A Yes, Madam.

THE COURT: I find that the defendant is aware of time, place and persons. He is sitting a few feet from me. I find he is an intelligent adult and I find that his waiver is made voluntarily, intelligently and with knowledge of the consequences.

I further find that he is aware of the differences between the jury and jury waived trials, that he has not been coerced or improperly influenced in his decision, and that he is presently capable of rational judgment.

I therefore accept his waiver of a jury trial.

[8] The defendant is being given a waiver of Jury Trial by his attorney. The interpreter will read him the contents of it because it is in English.

(Interpreter complies.)

THE COURT: Does the defendant understand what is written on the form he is being asked to sign?

THE WITNESS: Yes, Madam.

THE COURT: We will proceed. The defendant may be excused from the witness stand.

ME. BUSO: Judge, without repeating what was discussed in the lobby, the defendant is willing to stipulate to the facts which will be read into the record by Mr. McAlary. My understanding is pursuant to the agreement as to sentence, there is an agreed upon sentence to be proffered to the Court and that there will be a reduction from the charge as it currently stands of in excess of 200 grams to only in excess of 100 grams.

THE COURT: This is not a guilty plea. It should be absolutely clear to this defendant that he is not pleading guilty. Does the defendant understand that he is not being asked to plead guilty?

THE WITNESS: Yes, of course. **[9]**

THE COURT: Yes, of course. Is that the answer?

THE WITNESS: Yes, Madam.

THE COURT: Now I want to hear what evidence the Commonwealth would present at a trial, and the

purpose of doing this - one of the purposes - is so that the defendant can hear the evidence that would be presented at a trial, and for me to determine if there is enough evidence to warrant a finding of guilty on the indictment.

STATEMENT OF THE EVIDENCE:

MR. MC ALARY: On March 2nd of 1995, Trooper Donald Kennefick of the Massachusetts State Police obtained a search warrant for the premises occupied by David Almanzar and located at 440 North Avenue, Building Number 3, Apartment Number 60, in Haverhill.

At the time that he obtained the warrant, Trooper Kennefick was assigned to the Lawrence Unit of the Essex County Drug Task Force. The unit consisted of six police officers, some of whom had participated in the investigation which led to the application for the search warrant.

On March 6, 1995, Trooper Kennefick obtained additional information which led him to believe **[10]** that a search ought to be made of a second apartment, also occupied by David Almanzar and located at the Green Acres Apartment Complex, Building Number 1, Apartment 36, on Brown Avenue in Amesbury. In order not to alert Mr. Almanzar of the police interest in the Amesbury apartment, Trooper Kennefick deferred execution of the search warrant for 440 North Avenue in Haverhill until such time as a search warrant could be obtained and executed for the Amesbury apartment as well. In fact, he obtained a search warrant for the Amesbury apartment from the Newburyport District Court at approximately 3:00 p.m. on March 8, 1995.

Both warrants were executed during the evening hours of March 8, 1995. Trooper Kennefick

was on the Haverhill entry team. Upon the arrival of that team at 440 North Avenue, the officers knocked on the door and twice announced, "Police! Search warrant!" They received no response. At that point, they effected a forced entry into the apartment. A police dog accompanied the entry team.

The defendant was asleep inside the apartment when the officers entered. They immediately proceeded to wake him up and arrest him. His **[11]** hands were handcuffed behind his back and he was placed under guard.

Once the apartment had been secured, Trooper Kennefick asked the defendant who he was. The defendant replied, "David Almanzar." Trooper Kennefick explained to the defendant the officers' purpose in being there and showed to him the search warrant. The search of the apartment was then undertaken.

During the search the officers found and seized, among other items, a quantity of cocaine in crack and powder form; a sum of money; and baggies. They also discovered a telephone bill and rental document for 440 North Avenue, Building Number 3, Apartment 60, in the defendant's name; a money transfer receipt in the defendant's name and stating his address as 3 Cypress Street, Haverhill; a Massachusetts Electric bill in the defendant's name for 67 Washington Street, Apartment 501, Haverhill; and a notice to quit the Amesbury address, bearing the name of the defendant and one "Byas." The aforementioned Washington Street address was familiar to Trooper Kennefick because on March 6, 1995, while conducting a surveillance of the defendant, **[12]** Trooper Kennefick had followed him to that address.

At some point during the search, Trooper Kennefick spoke with a Trooper Krom, who was a member of the team conducting the Amesbury search. From Trooper Krom he learned that the Amesbury team had found at that location a drivers license in the defendant's name and listing his address as 3 Cypress Street, Haverhill. They also found a passport from the Dominican Republic in the name of Francisco Mejia Lopez, but displaying a photograph of the defendant, and also an envelope addressed to Francisco Mejia Lopez at 3 Cypress Street, Haverhill.

After speaking with Trooper Krom, Trooper Kennefick addressed the defendant. In the defendant's presence he weighed the cocaine which had been seized. Finding the weight to be in excess of 100 grams, he advised the defendant that the defendant was facing a mandatory sentence for trafficking in cocaine. The defendant listened impassively. Trooper Thomas Coffey advised the defendant of his Miranda Rights, upon which the defendant made no request for counsel. Trooper Kennefick then began to ask questions of him. **[13]**

At the time when the questioning occurred, the activity surrounding the search was dying down and the dog had been removed. In the room where the questioning occurred were Trooper Kennefick, Trooper Coffey, Trooper Canty and the DEA agent. The defendant remained handcuffed and appeared to have an excellent command of the English language. He showed no signs of confusion as he conversed with Trooper Kennefick in English.

Trooper Kennefick first asked the defendant if there was more cocaine in the house. The defendant replied, "No." Trooper Kennefick then asked the defendant who were the people whose names appeared on the various documents which had been seized during the two searches. The defendant replied

that he was David Almanzar and that he did not know who the other people were. Trooper Kennefick asked if there was cocaine elsewhere. The defendant answered in the negative. Trooper Kennefick next asked if there was cocaine at the Amesbury apartment. The defendant stated that his wife lived in the Amesbury apartment and there was no cocaine at that location.

Trooper Kennefick then turned to the subject **[14]** of 67 Washington Street in Haverhill. He asked the defendant if the defendant kept an apartment at 67 Washington Street. The defendant said, "No." Trooper Kennefick then informed the defendant that he had watched the defendant travel to that location on a previous night. The defendant stated that he had a friend who lived at that address. With some hesitation, he eventually acknowledged that the friend was a girlfriend.

Trooper Kennefick next inquired if the defendant kept an apartment at 3 Cypress Street in Haverhill. The defendant replied that he did. He stated that his father sometimes stayed there. Trooper Kennefick finally asked the defendant if the police could go to Washington Street apartment and the Cypress Street apartment to look for drugs. The defendant replied, "There is no more. Go ahead." The entire conversation between Trooper Kennefick and the defendant lasted approximately five minutes. During that time, with the exception of the previously mentioned hesitation acknowledging that he had a girlfriend, the defendant showed no reluctance at answering Trooper Kennefick's questions.

Trooper Kennefick proceeded immediately to **[15]** 67 Washington Street. He found Apartment 501 to be occupied by a Sonia Fuentes and an infant. Ms. Fuentes executed a written Consent to Search and the

officers conducted a search of the apartment. Nothing was found.

From 67 Washington Street the officers proceeded to 3 Cypress Street. They found that the building consisted of a two-story rooming house with approximately six rooms. Once inside the apartment, Trooper Kennefick spoke to an individual, the identity of whom he agreed to keep confidential. That individual pointed out an apartment on the second floor and identified it as belonging to the defendant. The individual also directed the officers to a basement apartment which he identified as belonging both to the defendant and one "Mario".

The officers entered the second floor apartment and found certain documents and plastic baggies containing cocaine residue. Using keys which they had seized from 440 North Avenue, they also entered and searched the basement apartment. During that search they found, among other things, quantities of cocaine and heroin. A subsequent analysis of all the drugs seized in this case came **[16]** back as cocaine in excess of 100 grams, and 92 bags containing heroin.

Those would be the stipulated facts, your Honor.

THE COURT: That would be the evidence that the Commonwealth would present, is that correct?

MR. MC ALARY: That's correct.

THE COURT: And that's the agreement, that that's the evidence that would be presented?

MR. MC ALARY: Yes, your Honor.

THE COURT: Mr. Buso, do you concur? Do you agree that that would be the evidence that would be presented at trial?

MR. BUSO: Yes, your Honor.

VERDICT:

THE COURT: I find that there is sufficient evidence to warrant guilty findings on both the indictments and I find that the defendant is guilty of both the charges.

MR. BUSO: Judge, the charge has never formally been reduced. Based upon the evidence, however, the charge itself is still in excess of 200 grams. I think the only evidence that has been presented is in excess of 100 grams.

THE COURT: I find the defendant is guilty of **[17]** the trafficking offense in the amount of over 100 grams of cocaine.

Mr. Buso, I will just ask you once more, does the defendant understand that he is not agreeing to the truth of anything that was said by the government?

MR. BUSO: Yes, your Honor. I have had lengthy discussions with Mr. Almanzar regarding his choices for a jury trial, jury waived, or stipulated facts trial.

THE COURT: Well, the stipulated facts trial is a type of jury waived trial.

MR. BUSO: Yes, and I believe that he fully understands the different options and has ultimately elected this manner in order to preserve his right of appeal on the prior motions.

THE COURT: Once again, Mr. Almanzar, do you understand everything that has gone on here today?

THE WITNESS: Yes, Madam.

THE COURT: Are there any questions, Mr. Almanzar, that you want to ask me?

THE WITNESS: Can I ask my attorney something in private?

THE COURT: Certainly.

(The defendant confers privately with **[18]** counsel, with the aid of the interpreter.)

MR. BUSO: Mr. Almanzar questioned counsel regarding other possible evidence in the case and I have explained to him --

THE COURT: Okay. You don't have to tell us what you said at all.

But, Mr. Almanzar, have you had sufficient time to discuss any questions you had with your attorney?

THE WITNESS: Yes, Madam.

THE COURT: Is there anything that you do not understand about what has happened here this morning?

THE WITNESS: No, everything is all right.

THE COURT: Fine.

You may proceed.

MR. MC ALARY: Your Honor, the Commonwealth moves for sentencing at this time. Based upon the findings of the Court, the agreed upon recommendation is that Mr. Almanzar be sentenced for the trafficking indictment, which is Indictment 921, to a period of incarceration in State Prison of ten to twelve years. And on Indictment 922, on which you found him guilty of possession of heroin with intent to distribute, **[19]** that he be sentenced to a period of incarceration in State Prison of five to eight years, and that sentence to run concurrently with the previous sentence.

THE COURT: Do you have anything that you want to say, Mr. Buso?

MR. BUSO: Nothing except that I would ask the Mit to reflect jail credit. He has been in custody since March 8th, the date of the indictment.

THE COURT: I will impose the sentence that is recommended; that is, ten to twelve years at M.C.I. Cedar Junction on the trafficking offense that is, trafficking in over 100 grams of cocaine; and a sentence of five to eight years is imposed on the second offense, to run concurrently with the first.

MR. MC ALARY: Thank you, your Honor.

SENTENCING:

THE CLERK: David Almanzar, on Indictment 9577-CR-921, charging trafficking, Class B, over 200 grams, after a jury waived trial, the Court having found you guilty to so much of that indictment that charges trafficking over 100 grams, the Court Orders you be punished by **[20]** imprisonment for a term of not less than ten, nor more than twelve years, and that sentence be executed upon you in and within the precincts of the Massachusetts Correction Institution

at Cedar Junction, and you stand committed in execution of that sentence.

On Indictment 9577-CR-922, charging possession of Class A with intent, the Court having found you guilty after a jury waived trial, the Court Orders you be punished by imprisonment for a term of not less than five, nor more than eight years, and that that sentence be executed upon you in and within the precincts of the Massachusetts Correction Institution at Cedar Junction, and you stand committed in execution of that sentence. The Court further Orders that that sentence is to run concurrent with Indictment 9577-CR-921.

You are also assessed $100 for the Victim/Witness Assistance Program and a $150 Mandatory Drug Assessment. You are credited with 406 days time served.

(Whereupon, the above-entitled matter was adjourned.)

****

[21]

CERTIFICATE

RE: PAGES 1 thru 20 INCLUSIVE.

I, ELIZABETH VEGA, Court Reporter, do hereby certify that the foregoing proceedings was taken by me and is a true record of the proceedings to the best of my ability.

Dated at Boston, Massachusetts this 17th day of May, 1996.

/s/_____
ELIZABETH VEGA

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the brief and appendix in this case was served on William J. Meade, Assistant Attorney General, 1 Ashburton Place, Boston, MA, 02108 by first class mail, postage pre-paid on November 1, 2001.

/s/_____
Robert O. Berger